

Jan 03, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KELLI GRAY, and all others similarly
situated,

Plaintiffs,

v.

SUTTELL & ASSOCIATES, et al.,

Defendants.

EVA LAUBER, et al.,

Plaintiffs,

v.

ENCORE CAPITAL GROUP, INC., et al.,

Defendants.

No. 2:09-cv-00251-SAB

**ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT;
GRANTING DEFENDANTS'
CROSS-MOTION FOR
SUMMARY JUDGMENT;
CLOSING FILE**

Before the Court is Plaintiff Dane Scott's Motion for Summary Judgment, ECF No. 620. A hearing was held on the motion on December 20, 2018. Plaintiff was represented by Kirk Miller. The Midland Defendants were represented by John Munding.

Plaintiff Dane Scott is the sole remaining Plaintiff. The sole remaining claim against the Midland Defendants is a Washington Consumer Protection Act ("CPA") claim based on the allegation that Defendant Midland Funding acted as a

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT; GRANTING DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT; CLOSING FILE ~ 1**

1 “collection agency” without a “collection agency” license. All other claims
2 asserted against Defendants have been resolved by prior Court rulings. ECF Nos.
3 416, 544, and 580.

4 **MOTION STANDARD**

5 Summary judgment is appropriate if the “pleadings, depositions, answers to
6 interrogatories, and admissions on file, together with the affidavits, if any, show
7 that there is no genuine issue as to any material fact and that the moving party is
8 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no genuine
9 issue for trial unless there is sufficient evidence favoring the nonmoving party for a
10 jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477
11 U.S. 242, 250 (1986). The moving party has the initial burden of showing the
12 absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,
13 325 (1986). If the moving party meets its initial burden, the non-moving party must
14 go beyond the pleadings and “set forth specific facts showing that there is a
15 genuine issue for trial.” *Id.* at 325; *Anderson*, 477 U.S. at 248.

16 In addition to showing there are no questions of material fact, the moving
17 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
18 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
19 to judgment as a matter of law when the non-moving party fails to make a
20 sufficient showing on an essential element of a claim on which the non-moving
21 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
22 cannot rely on conclusory allegations alone to create an issue of material fact.
23 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

24 Where parties submit cross-motions for summary judgment, “each motion
25 must be considered on its own merits.” *Fair Hous. Council of Riverside Cnty. v.*
26 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). In analyzing the two motions,
27 a court has an independent duty to review each motion and its supporting evidence
28 to evaluate whether an issue of fact remains when the parties believe there is no

**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT; GRANTING DEFENDANTS’ CROSS-MOTION FOR
SUMMARY JUDGMENT; CLOSING FILE ~ 2**

1 issue of material fact. *Id.* In doing so, a court may neither weigh the evidence nor
2 assess credibility; instead, “the evidence of the non-movant is to be believed, and
3 all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

4 **BACKGROUND FACTS**

5 There are two corporate entities that are encompassed by the term “Midland
6 Defendants.” Midland Funding (“MF”) was formed to purchase claims for
7 collection, has actually purchased claims, and has subsequently filed over 7,000
8 collection lawsuits in Washington between 2005 and 2010. During this time, MF
9 was not licensed as a collection agency in the state of Washington. MF is owned by
10 Midland Portfolio Services, which is owned by Midland Credit Management Inc.,
11 which is owned by Encore Capital Group, Inc. MF has no employees.

12 Midland Credit Management Inc. (“MCM”) was a licensed collection
13 agency in the State of Washington during the time in question. MCM contracts
14 with law firms to bring collection lawsuits on behalf of MF. MCM employees
15 determine whether to purchase the consumer debt portfolios. They negotiate with
16 the creditors, and if its bid is accepted, they prepare the purchase agreement that
17 indicates the debt is being purchased by MF. Officers for MF are the same officers
18 for MCM and an officer will sign the purchase agreements in the name of MF.

19 In Plaintiff Dane Scott’s case, the law firm contracted by MCM filed a
20 collection law suit on behalf of MF, filed a Motion for Default Judgment, and
21 requested attorneys’ fees in the amount of \$650.00 in Benton County Superior
22 Court. A Writ of Garnishment was also sought and received, and funds were
23 withheld from Plaintiff’s pay check. The seeking and executing the Writ of
24 Garnishment is the basis of the Washington Consumer Protection Act claim.
25 Plaintiff maintains that Defendant MF was required to obtain a license before it
26 could bring lawsuits in the state courts. Because it was unlicensed, any actions
27 taken in the state courts were illegal and violated the CPA.

28 //

**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT; GRANTING DEFENDANTS’ CROSS-MOTION FOR
SUMMARY JUDGMENT; CLOSING FILE ~ 3**

WASHINGTON CONSUMER PROTECTION CLAIM

To maintain a Washington CPA claim, the plaintiff must show:

- (1) An unfair or deceptive act or practice by a defendant;
- (2) Occurring in trade or commerce
- (3) An impact on the public interest
- (4) Injury to the plaintiff's business or property
- (5) Causation (the alleged unfair or deceptive act caused Plaintiff's injury).

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 784-85 (1986).

No person may act as a "collection agency" without first having applied for an obtained a license. Wash Rev. Code § 19.16.110. Operating a "collection agency" without a license is a *per se* unfair practice under the WCPA. Wash. Rev. Code § 19.16.440; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 53 (2009) ("When a violation of debt collection regulations occurs, it constitutes a *per se* violation of the CPA and [Federal Trade Commission Act] under state and federal law, reflecting the public policy significance of this industry.").

LAW OF THE CASE

The doctrine of the law of the case stands for the proposition that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent states in the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815 (1988). The rule of law doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Id.* (quotation omitted). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT; CLOSING FILE ~ 4

1 The Ninth Circuit has instructed that this doctrine is a guide to courts’
2 exercise of discretion, rather than a rigid rule. *See Tahoe-Sierra Pres. Council, Inc.*
3 *v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000); *United States*
4 *v. Miller*, 822 F.2d 828, 832-33 (9th Cir. 1987); *Castner v. First Nat’l Bank of*
5 *Anchorage*, 278 F.2d 376, 379-80 (9th Cir. 1960). There is no strict prohibition
6 against one district judge reconsidering and overturning the interlocutory order or
7 ruling of a prior district judge in the same case before final judgment, though “one
8 judge should not overrule another except for the most cogent reasons.” *United*
9 *States v. Desert Gold Min. Co.*, 433 F.2d 713, 715 (9th Cir. 1970); *see also, e.g.,*
10 *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1117-18 (9th Cir. 2002);
11 *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 530 (9th Cir. 2000). Cogent
12 reasons include a determination that a prior order was clearly erroneous and would
13 result in a “useless trial.” *Castner*, 278 F.2d at 380; *see also Delta Sav. Bank v.*
14 *United States*, 265 F.3d 1017, 1027 (9th Cir. 2001).

15 ANALYSIS

16 In his Motion, Plaintiff urges this Court to find that Defendant MF was
17 operating as an unlicensed collection agency. He argues the facts demonstrate that
18 MCM was acting a MF’s agency for purposes of purchasing debt.

19 Defendants challenge Plaintiff’s Motion for Summary Judgment with three
20 arguments: (1) MF was not required to be licensed as a “collection agency” under
21 the WCAA; (2) MF, even if required to be licensed under the WCAA, is entitled to
22 the WCPA good faith exception; and (3) Plaintiff has not sustained an “injury to
23 property or business” as required to maintain a WCPA cause of action.

24 (1) Whether Midland Finding was operating as a “collection agency” 25 under the Washington Collection Agency Act?

26 In *Gray v. Suttell & Assocs.*, 181 Wash.2d 329 (2014), the Washington
27 Supreme Court set forth the standard the Court should apply in order to determine
28 whether Defendant MF was acting as an “unlicensed collection agency”: “if the

1 court finds that Midland Funding LLC solicited claims, then Midland Funding is a
2 collection agency and it cannot file collection lawsuits without a license.” *Id.* at
3 332.

4 It noted:

5 Soliciting claims for collection involves conduct aimed at procuring a
6 claim for collection. A passive market participant does not “solicit”
7 claims for collection. There must be some affirmative act on the part
8 of the solicitor. For example, the solicitor could advertise that it is
9 purchasing claims, target individual sellers, enter into contracts with
10 sellers to purchase claims, or perform market-based research to
11 generate lists used to purchase claims.

12 ***

13 By contrast, if a company is formed, sits idle, and never actually
14 solicits or acquires any claims for collection, that company has not
15 solicited claims for collection. Nor has a company solicited claim if it
16 engages in no marketing and merely passively accepts offers.

17 *Id.* at 340-41.

18 Finally, it instructed:

19 Midland Funding, a debt buyer, is a “collection agency” under RCW
20 19.16.100(2) if the district court finds that Midland Funding solicited
21 claims for collection—that is, if Midland Funding or its agents took
22 any affirmative steps to obtain claims for collection.

23 *Id.* at 341.

24 While Defendant MF asks this Court to find it was not acting as a collection
25 agency under the WCAA, it also suggests that in the alternative, the Court find that
26 material questions of fact remain for a jury to resolve. Defendant MF has not
27 identified what facts are in dispute. It appears there are none. As such, the issue as
28 to whether MF operated as a collection agency is ripe for decision. *See Leingang v.*
Pierce Cnty Med. Bureau, 131 Wash. 2d 133, 150 (1997) (noting that the
determination of whether a particular statute applies to a factual situation is a

1 conclusion of law: “Since there is no dispute of facts as to what the parties did in
2 this case, whether the conduct constitutes an unfair or deceptive act can be decided
3 by this court as a question of law.”).

4 Here, the undisputed facts establish that MF or its agents took affirmative
5 steps to obtain claims for collection. Employees of MCM, acting as agents of MF,
6 entered into contracts on behalf of MF to purchase debts. This meets the definition
7 supplied by the Washington Supreme Court.¹ As such, the Court finds as a matter
8 of law that Defendant MF was acting as an unlicensed collection agency.

9 **(2) Whether Midland Funding is entitled to the WCPA good faith**
10 **exception?**

11 Defendant MF argues that even if the Court concludes it was acting as a
12 “collection agency,” it is entitled to a good faith defense. In order for the Court to
13 agree with Defendant, it will be necessary to revisit Judge Peterson’s ruling that the
14 good faith exception is not available for per se violations of the Washington CPA.

15 Under Washington law, acts or practices performed in good faith under an
16 arguable interpretation of existing law do not constitute unfair conduct that violates
17 the Washington CPA. *Perry v. Island Sav. And Loan Ass’n*, 101 Wash.2d 795, 810
18 (1984) (“We hold acts or practice performed in good faith under an arguable
19 interpretation of existing law do not constitute unfair conduct violative of the
20 consumer protection law.”); *Leingang*, 131 Wash.2d at 155; *see also Watkins v.*
21 *Peterson Enter., Inc.* 57 F.Supp.2d 1102, 1111 (E.D. Wash. 1999) (concluding the
22 good faith defense is available for per se violations of the consumer protection
23 laws).

24 Although Plaintiff argues the good faith exception does not apply to
25

26 ¹ Indeed, as the Washington Supreme Court noted, “[i]t strains credulity to suggest
27 that Midland Funding acquired 7,278 claims for collection without ever
28 undertaking any steps to solicit claims.” *Id.* at 341, n.8.

1 violations of black letter law, he does not cite to any case law to support his
2 argument. Given the lack of precedent to support his position, as well as the
3 precedent concluding otherwise, the Court will revisit Judge Peterson's decision
4 and find that the good faith defense is available to excuse per se violations of the
5 Washington CPA.

6 Here, there is no dispute that the question of whether MF was required to
7 obtain a collection agency license was unclear. Indeed, the Washington Collection
8 Agency Board, the agency that is charged with administering the WCAA, indicated
9 in 2004 that debt buyers that collect solely on their own claims and in their own
10 names are not covered by chapter 19.16 RCW. While the Board gave signals it was
11 reconsidering that decision, during the time in question it was not clearly
12 established that a license was required if the debt was owned by the person
13 bringing the collection action. An even clearer signal that the statute was not clear
14 is the fact that Judge Shea certified this exact question, *i.e.* whether MF was
15 required to obtain a license before it could bring collection actions in state courts,
16 to the Washington Supreme Court, and the Washington Supreme Court issued a
17 published opinion after a careful and exacting analysis of the issue.

18 It follows that Defendant MF's belief that a license was not required if it
19 owned the debt was a reasonable one. Therefore, even though this Court found that
20 MF was required to obtain a license prior to bring collection actions, it is entitled
21 to assert the good faith defense. Because the Court finds Defendant MF acted in
22 good faith, it cannot be held liable under the Washington Consumer Protection Act.
23 Summary judgment in favor of the Midland Defendants is appropriate.²

24
25
26 ²Because the Court concludes that Defendant MF is entitled to the good faith
27 defense, it is not necessary to revisit Judge Shea's ruling that "to the extent that
28 Mr. Scott alleges an injury as a result of the garnished amount based solely on the

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 620, is **DENIED**.

2. The Midland Defendants' Cross-motion for Summary Judgment, ECF No. 622, is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of the Midland Defendants and against Plaintiff Dane Scott.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order, forward copies to counsel and **close the file**.

DATED this 3rd day of January 2019.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge

underlying debt and interest thereon, Mr. Scott fails to allege an injury to business or property." ECF No. 416, at 13.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT; CLOSING FILE ~ 9